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IN THE

Supreme Court of The United States

OCTOBER TERM, 1998

THE STATE OF MISSISSIPPI,

Petitioner,

VERSUS

BYRON RODERICK, BILLY SAXTON and CYNTHIA SAXTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

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90 pp

QUESTION PRESENTED

WHETHER THE MISSISSIPPI SUPREME COURT ERRED IN ITS APPLICATION OF FOURTEENTH AMENDMENT DUE PROCESS TO THE STATE RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT (RICO), MISS. CODE ANN. § 97-43-5 *et seq.*, THE COLLECTION OF AN UNLAWFUL DEBT INCURRED IN THE BUSINESS OF LOANING MONEY, HOLDING THE STATUTE VOID FOR VAGUENESS.

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No. 98-

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

THE STATE OF MISSISSIPPI,
Petitioner

VERSUS

BYRON RODERICK, BILLY SAXTON
and CYNTHIA SAXTON,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

INTRODUCTION

Petitioner respectfully prays that a Writ of Certiorari issue to the Supreme Court of Mississippi to review its decision in this case.

OPINION BELOW

The denial of the Motion for Rehearing was issued on November 6, 1997, by the Mississippi Supreme Court

and is not reported. (App., *infra* A-30). The opinion of the Mississippi Supreme Court issued August 7, 1997, is reported at 1997 WL 441924. (App., *infra*, A-1). The Order of the Harrison County Circuit Court, First Judicial District issued on June 16, 1995, is not reported. (App., *infra*, A-31).

JURISDICTION

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1275. Under the Fourteenth Amendment of the Constitution of the United States, §1, and *Connally v. General Construction Co.*, 269 U.S. 385 (1926), the Mississippi Supreme Court found that the Mississippi RICO Act, Miss. Code Ann. § 97-43-5(3), the collection of an unlawful debt incurred or contracted for through the business of loaning money at a rate more than twice the legal rate of interest, was void for vagueness.

CONSTITUTIONAL AND STATUTORY PROVISIONS

1) Amendment XIV, § 1, United States Constitution (App., *infra* A-54).

2) 18 U.S.C.A. § 1962. (App., *infra* A-46).

3) Mississippi Racketeering Influenced Corrupt Organizations Act, Miss. Code Ann. 1972, as amended, §§ 97-43-5(3) and (4) and 97-43-1 (App., *infra*, A-43).

4) Miss. Code Ann. 1972, as amended, § 75-17-1, "Legal Rates of interest and finance charges."

STATEMENT

Respondents, doing business as We Cash It, a personal check cashing enterprise, were indicted in Harrison County, First Judicial District, Mississippi on three counts of knowingly, willfully and feloniously conducting or participating in the enterprise of the

collection of an unlawful debt under § 97-43-5(3) and one count of conspiracy to collect an unlawful debt under § 97-43-5(4) of the Mississippi Code Annotated, 1972, commonly known as RICO.

The Harrison County Circuit Court ordered the quashing of the indictment on the grounds that the Mississippi RICO statute, § 97-43-5(3) was void for vagueness, failing to provide Fourteenth Amendment Constitutional notice to the defendants of the prohibited conduct of the statute and that the RICO statute criminalized the existing Mississippi usury statute, Miss. Code Ann. §75-17-1. The State appealed the adverse ruling of law to the Mississippi Supreme Court, which affirmed the trial court's order. A petition for rehearing was denied. The State of Mississippi is now seeking this Court's review of the Mississippi Supreme Court's opinion under the guidance of this Court in *Arizona v.*

Evans, 463 U.S. 1032, (1995), *citing*, (*Michigan v. Long*, 463 U.S. 1032 (1983)) in that the state court's decision on the validity of the statute was based primarily on federal law and application of Fourteenth Amendment Due Process. The decision on the state RICO statute is so interwoven with the federal law, specifically that the state RICO parallels the language and interpretation of the federal RICO statute that the decision will lead to misinterpretation of the Fourteenth Amendment Due Process.

REASONS FOR GRANTING THE WRIT

The Mississippi Supreme Court held the state RICO statute void for vagueness "as applied to usury", *State v. Roderick*, 1997 WL441924,6 (Miss. 1997). The State contends that Fourteenth Amendment Due Process requirement of fair notice was met and that the statute should have been construed to uphold its presumptively

constitutional status as passed by the Legislature. Although the court set out its standard of review under Mississippi law, it only referred to its authority to interpret the constitutionality of statutes. This was a case of first impression on the constitutional challenge to state RICO, and the court relied on the Due Process standards of fair notice and application of the Fourteenth Amendment of the United States Constitution citing its application of the *Connally* test in *Meeks v. Tallahatchie County*, 513 So. 2d 563 (Miss. 1967) and *Cassibry v. State*, 404 So. 2d 1360, 1367-68 (Miss. 1981).

However, the State contends that the court failed to apply the concept if a reasonableness of construction of the statute and erred in acceptance of the Respondents' alleged attempts to determine if they were in compliance with the laws of the state in the operation of their check cashing business, whose only service was the

advancement of funds against personal checks which were held for fourteen days for a fee of up to 900% a.p.r., a rate of interest that far exceeded *any* rate of interest legalized by the Mississippi Legislature. The amount of interest the Respondents charged on each roll over of personal checks held for a fee was far in excess of any legal rate of interest allowed by state law. The check cashing industry was not regulated by state law; however, the interest which was charged was far greater than the legal amount of 8% a.p.r. set out in the usury statute. A typical loan from We Cash It of $200.00 had a finance charge of $50.00 for use of the money for a period of fourteen days which is equal to an annual percentage rate of 642.86%.

When a state statute is challenged on grounds of void for vagueness, a state court should look to jurisprudence of this Court for interpretation of the

statute or to the decisions of federal courts of appeal or to the interpretation of other state courts with similar statutes. The state court acknowledged in its opinion that Mississippi modeled its RICO statute on the Federal RICO statute, 18 U.S.C.A. § 1962 but failed to rely on the body of law interpreting the federal statute.

The court did not look to the interpretation of the language of the Federal RICO statute and the intent of the law set forth by Congress. Both the Mississippi and Federal RICO statutes define the crime of participation in an enterprise of the collection of an unlawful debt and the crime of conspiracy, the crimes for which the Respondents were indicted. (App., *infra* A-48).

The Federal RICO statute defines an "unlawful debt" as one which is uncollectible because it is more than

allowed by the federal or state usury laws. [1] "Section 1961(6), ... defines two separate categories of unlawful debts: one involving gambling activity and the other involving loan sharking activity." *United States v. Giovanelli*, 945 F. 2d 479, 491 (2nd Cir. 1991).[2] Likewise, the Mississippi RICO prohibits loan sharking in its four new crimes. An offense under state law may be charged *either* through the criminal enterprise of a 1) **pattern of racketeering activity** *or* 2) **through the collection of an unlawful debt**. Miss. Code Ann. § 97-

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[1] " a debt (A) incurred or contracted in gambling activity which was in violation of the law or which is unenforceable under State or Federal law ... because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law ... **or the business of lending money or a thing of value at a rate usurious under State or Federal law** ... " 18 U.S.C. §1961(6). [Emphasis added.]

[2] Federal RICO's definition of " unlawful debt" is the same as "usury" which was determined by this Court in *Fowler v. Equitable Trust Co.*, 141 U.S. 411 (1891); *See also, Reidy v. Meritor Sav., F.S.B.*, 705 F. Supp. 39,40 (D.D.C., 1989)

43-5.

The Mississippi RICO statute defines "unlawful debt" as:

> money or any other thing of value constituting principal or interest or a debt which is legally unenforceable in whole or in part because the debt was contracted in the business of gambling activity in violation of state law or in the business of lending money at a rate usurious under state law, where the usurious rate is at least twice the enforceable rate."

Miss. Code Ann. §97-43-3(b).

Additionally, the Mississippi RICO statute specifically states that it is applicable to "licit as well as illicit enterprises" . Miss. Code Ann. § 97-43-3(c). Penalties for violation of the statute are clearly stated in Miss. Code Ann. § 97-43-7.

The Mississippi Supreme Court misapplied the principles of *Connally v. General Construction Co.*, 269 U.S. 385 (1926), in determining that the statute did not

give Due Process notice to a person of common intelligence that participation in an enterprise of collection of an unlawful debt through the business of loaning money at a rate more than twice the interest rate defined by state law was a criminal offense. The court found that state RICO criminalized usury; the State argued that state RICO referred to the usury statute in the definition of an "unlawful debt" for the purpose of determining the legal rate of interest. In his dissent, Justice Banks found that the state RICO statute did not criminalize all usury, but the charging of usurious interest over twice the amount allowed by law was an element of proof in the collection of an unlawful debt under the state RICO statute.

The State also argued that the state RICO statute set out new prohibited crimes and new penalties and that the statute should be reasonably construed in keeping

with Legislative intent to eradicate organized crime.

Therefore, the State of Mississippi respectfully petitions for a writ of certiorari to review the judgment of the Mississippi Supreme Court in this case.

ARGUMENT

The right to be informed of the nature of the accusation against a person is the principle behind the test of *United States v. Hariss,* 347 U.S. 612 (1954). No person shall be held criminally responsible for conduct which he could not reasonably understand proscribed. *Huntley v. State*, 524 So. 2d 572,575 (Miss. 1988).

The Mississippi Supreme Court in its determination that the Respondents had no knowledge that they were operating outside the law by claiming a defense of lack of intent to violate any law, narrowed the Fourteenth Amendment notice standard set by this Court in *Connally*, *supra*, under which a criminal statute meets

Due Process requirements if it is

> sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties ... . A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning ... violates the first essential of due process of law.

Id.

When a state law is based on the federal law, the state looks to federal jurisprudence in the interpretation of its own statute.[3] A stated purpose of Federal RICO "was to eradicate organized crime by 'establishing *new* penal prohibitions, and by providing enhanced sanctions and *new remedies* to deal with the unlawful activities of those engaged in organized crime.'" *United States v. Gambale*, 610 F. Supp. 1515,1546 (D.C. Mass. 1985).

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[3] *See*, 33 Am. Crim. L. Rev. 1556, ftn. 945 (1996)(recent cases of vagueness challenges to state RICO statutes; Fourteenth Amendment Due Process test is one of reasonable construction of statute).

The Mississippi Supreme Court, relying on federal jurisprudence in *Evans v. National Bank of Savannah,* 251 U.S. 108 (1919), determined that regardless of the terminology applied to the actions of the Respondents, whether the discounting of notes or loan sharking, the legal rate of interest for their check cashing services was determined by the usury statute, Miss. Code Ann. § 75-17-1; 8% per annum was applicable to Respondent's business transactions. [4] *Accord, Sunburst Bank v. Keith,* 648 So. 2d 1147,1151-52 (Miss. 1995). The law has long been stated in Mississippi that in the recovery of usurious interest ignorance of the law is no excuse and may not be

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[4] The court specifically found that if the Respondents were discounting notes, Miss. Code Ann. § 75-17-5 would apply. Notably the language of said statute refers to "rate of discount or interest is allowed by laws of this state", broad language from which the Mississippi Supreme Court easily determined the rate of interest allowed by law as applied to the Respondents was 8% per annum, which is found under the usury statute, §75-17-1.

asserted as a defense. *Hebron Bank v. Gambrell*, 77 So. 148 (Miss. 1918). Therefore, the Petitioner urges that there was Due Process notice of the rate of interest allowed under the laws of the State of Mississippi; the language of the statute was not vague as to the rate of interest allowed under the usury statute.

The Mississippi Supreme Court failed to analyze the words of the RICO statute giving them a reasonable meaning upholding the constitutionality of the statute as passed by the Legislature. *Connally; Miss. Power Co. v. Goudy*, 495 So. 2d 257,263 (Miss. 1984). If no legislative guidance is given to the contrary, the words of a statute should be ascribed their ordinary and usual meaning. *Ahmad v. State*, 603 So. 2d 843(Miss. 1992). *Cf.*, *United States v. Lanier*, 117 S.Ct. 1219, 65 USLW 4232 (U.S. 1997), (Due Process notice upheld in the conviction of a judge acting willfully under color of state

law in the sexual assault of persons who appeared before his court in violation of 18 U.S.C. § 242). "[T]he touchstone is whether the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal. " *Id.*, at 1225. Again this Court emphasized the reasonableness of notice of criminal conduct.

Due Process will not invalidate a statute if assistance if necessary to give the words of the statute a reasonable meaning. "Legal dictionaries, treatises and dictionary definitions may also be used to save a statute from being constitutionally void for vagueness." *State v. Linares*, 630 A. 2d 1340,1347 (Conn. App. 1993); *Accord, Merritt v. Council Bluffs Civ. Service,* 458 N.W. 2d 867 (Iowa App. 1990). The State argued in its brief that "usury" was easily determined by consulting a dictionary.

Due Process does not require that a statute is void

for vagueness if the average person must seek legal counsel in order to interpret the statute and its interpretive jurisprudence. 62 Harv. L. R. 77,78 (1948), *citing, (United States v. L. Cohen Grocery Co.*, 225 U.S. 81,92 (1921) and *United States v. Screws*, 352 U.S. 91,128 (1945)). If words were so clear that only one meaning was allowed, judicial interpretation would be unnecessary. "A statute so vague as to have no predictable meaning is void for vagueness. But this doctrine does not ordain the unconstitutionality of a statute that two lawyers may read differently, not does it mean that persons subject to the law may bank against startling or inconsistent decisions." *Galjour v. Gen. Am. Tank Car Corp.*, 764 F. Supp. 1093,1098 (U.S.D.C., E.D. La. 1991). The Respondents argued that they consulted persons in the check cashing business in addition to the Attorney General's Office to determine the

legality of the business; the check cashers had representation of counsel as well.

In the instant case, the State argued that the Respondents had statutory notice plus the additional notice of "willfulness" of criminal conduct supplied by the indictment in spite of their assertions of a good faith phone call to the Attorney General's Office to a determination of the legality of the business. Due Process does not require invalidation of a statute in light of a mistake of law or a good faith defense. *Cheek v. United States*,98 U.S. 192 (1991)(defendant's belief that complicated tax laws were not applicable to his wages).

Due Process does not require invalidation of a statute when the statute specifically states the prohibited conduct and the penalties for the proscribed conduct as does the state RICO statute. The court found that because no cross reference was made to the usury statute the

RICO statute did not give fair warning that "usury was a prosecutable offense". The court extrapolated the definitional section of predicate acts, specifically enumerated felonies and misdemeanors, of the proof "racketeering activity" in Miss. Code Ann. § 97-43-3(a) and applied the same rationale to the collection of an "unlawful debt" Miss. Code Ann. § 97-43-3(b). The State argued that the collection of an unlawful debt may be proved by the collection of a single debt, and the statute does not require proof of predicate acts necessary to proof of "racketeering activity".

The Respondents pled lack of notice because they were a new business enterprise. This Court has found the language of the Federal RICO statutes is broad enough to encompass crimes and schemes not yet defined and explicit enough to give Due Process fair notice. *H.J. v. Northwestern Bell*, 492 U.S. 229 (1989); the fact that

check cashing was not a business when the state statute was adopted is not relevant to a Due Process analysis.

Due Process does not require that a criminal statute define offenses with such particularity that the statute is overly narrow. *Grayned v. City of Rockford*, 408 U.S. 104 (1972)(mathematical precision impossible when using words); *United States v. Hariss,* 347 U.S. 612,618 (1954). Respondents asserted that they did not know that they were in violation of the usury law or the RICO Act and that no law applied to them. They claimed to be outside the law but should have known that the amount of interest or "service " fees on the post-dated personal checks was above any legal rate of interest in the state. *But see*, 33 Am. Crim. L. R. 1345,1622, ftn. 35 (1996)(mistake of law generally not a defense to criminal prosecution).

Although citing the federal Constitutional standard

of *Connally,* the state court did not apply the principles of notice and application of the law by officials, it is the lack of notice of the proscribed conduct upon which this case hinged. The State averred that the Mississippi RICO statute, like the Federal model, created new offenses and did not criminalize usury. A stated purpose of federal RICO "was to eradicate organized crime by 'establishing *new* penal prohibitions, and by providing enhanced sanctions and *new remedies* to deal with the unlawful activities of those engaged in organized crime.'" *United States v. Gambale*, 610 F. Supp. 1515,1546 (D.C. Mass. 1985).

Additionally, the Mississippi Supreme Court failed to look to the statute to interpret the state of mind, "criminal intent", found in the statute and necessary to prove a crime under state RICO beyond a reasonable doubt. Miss. Code Ann. § 97-43-5(1). If the

Respondents were charged with "racketeering activity" the state statute points directly to criminal convictions which may be used as predicate acts in the proof of the RICO crime. Unlike proof of a pattern of racketeering activity which requires proof of two or more predicate acts, the RICO crime of collection of an unlawful debt may be proved by the collection of a single debt. *United States v. Weiner,* 3 F. 3d 17,24 (1st Cir. 1993).

The State argued that the Federal RICO statute contains no *mens rea,* which may be read into the statute by looking to the predicate acts to set the elements of the crime. In contrast, the state RICO statute adds an element of "criminal intent" which must be read *in pari materi* and applied to each of the prohibited acts in the statute. Miss. Code Ann. § 97-43-5(1-4).

The State argued that in addition to statutory intent, the elements of the crime must be read in

conjunction with proof of usury as an element of the RICO crime. Also, the Fifth Circuit has found that in the case of charging criminal conduct under a RICO statute, the element of intent may be supplied by the indictment by "knowingly, intentionally and criminally". *United States v. Aucoin,* 964 F. 2d 1492 (5th Cir. 1992)(conviction of the collection of an unlawful debt through conducting an enterprise of sports bookmaking).[5]

Following the Fifth Circuit's guidance, the indictment in the instant case also charged criminal intent.

The State in the instant case argued that the *mens rea* may be proved by "conduct, surrounding

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[5] Clearly a narrow indictment will not cure an already vague statute. "This is not to say that a bead-sight indictment can correct a blunderbuss statute, for the later itself must be sufficiently focused to forewarn of both its reach and coverage." *United States v. National Dairy Prod. Corp.*, 372 U.S. 29, 9 L. Ed 2d 561,566, 83 S. CT. 594 (1963) (statute held not vague on its face and in light of conduct to which it was applied).

circumstances and result of the acts of the accused." 33 *Am. Crim. L. R.* 1345,1622, appendix D (State of Mind under RICO). (1996). *See also, United States v. Liparota,* 471 U.S. 419, 85 L. Ed. 2d 454, 105 S. Ct. 2084 (1985). *Aucoin, supra; Fort Wayne Brooks, Inc. v. Indiana,* 489 U.S. 57-58 (1989)(if predicate constitutional, RICO not facially vague); *See also,* 33 Am. Crim. L. R.1431-35 (1996)(state of mind requirement for RICO). The result of the Respondents' acts is equal to knowledge of the consequences of their acts.

The Mississippi Supreme Court looked at the Respondents' mistake of law defense, interpreting it instead as lack of criminal intent, a matter of proof at trial and not part and parcel of a void for vagueness analysis of the statute. *See United States v. Biasucci,* 786 F. 2d 584 (1986) (RICO loan sharking, government not

required to prove defendants had specific intent to violate state usury laws) and *United States v. Scotto,* 641 F. 2d. 47,55 (1980)(no specific intent to engage in unlawful act prohibited by RICO).

The RICO statute must be construed so as to effectuate the legislative intent to eradicate organized crime. When the language of the statute conveys sufficient definite warning of the proscribed conduct when measured by common understanding and practices, the Constitution requires no more." *United States v. Petrillo,* 332 U.S. 1,8 (U.S. 1947). The willfulness of a defendant is a jury question and must be decided in light of all the evidence, and the construction of the statute must be reasonable under the precepts of Fourteenth Amendment Due Process.

The Mississippi RICO statute meets these requirements. The statute sets out prohibited conduct and

penalties of new crimes as well as noticing persons who come under the statute of criminal intent necessary for proof of RICO crimes. Therefore, the State of Mississippi seeks this Court's review of the misapplication of Constitutional standards to the state RICO statute.

CONCLUSION

For the above and foregoing reasons the State of Mississippi would submit that this Court review the decision of the Mississippi Supreme Court reversing the holding that the Mississippi RICO Act, 97-43-5(3) was void for vagueness under Fourteenth Amendment Due Process.

Respectfully submitted,

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STATE OF MISSISSIPPI

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APPENDIX

IN THE SUPREME COURT OF MISSISSIPPI

NO. 95-KA-00701-SCT

STATE OF MISSISSIPPI

v.

BYRON RODERICK, BILLY SAXTON AND CYNTHIA SAXTON

DATE OF JUDGMENT: 06/16/95
TRIAL JUDGE: HON. ROBERT H. WALKER
COURT FROM WHICH APPEALED: HARRISON COUNTY CIRCUIT COURT
ATTORNEY FOR APPELLANT: OFFICE OF THE ATTORNEY GENERAL
BY: JEAN SMITH VAUGHN
ATTORNEY FOR APPELLEES: EARL L. DENHAM
DISTRICT ATTORNEY: CONO CARANNA
NATURE OF THE CASE: CRIMINAL - FELONY
DISPOSITION: AFFIRMED - 8/7/97
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

BEFORE SULLIVAN, P.J., McRAE AND MILLS, JJ.

SULLIVAN, PRESIDING JUSTICE, FOR THE COURT:

Byron M. Roderick, Billy D. Saxton, and Cynthia

Saxton were indicted by the Grand Jury of Harrison County during the March, 1994, term for violation of Mississippi's RICO Act, specifically Miss. Code Ann. § 97-43-5(3). The indictment charged that the defendants were engaged in a pattern of collecting unlawful debt through their association in an enterprise, a check cashing business called "We Cash It." Count II of the indictment charged Roderick and the Saxtons with conspiracy to participate in the unlawful collection of debt, in violation of Miss. Code Ann. § 97-43-5(4).

On March 20, 1995, the State filed a Motion to Compel Defendants' Disclosure of Potential Adverse Witnesses. The motion stated that the defendants had indicated their intent to call State's attorneys Morgan Shands and Jean Vaughan as adverse witnesses. There had also been an indication to call a witness to testify to the contents of an alleged conversation between the

defendants and a female attorney in the Consumer Protection Division of the Attorney General's Office regarding the legality of the check cashing business. State's attorney Leslie Staehle was the Director of the Consumer Protection Division at the time of the alleged conversation. The State was concerned about a possible conflict of interest that could arise if the defendants called any of these State's attorneys as adverse witnesses, and requested that the court require the defendants to disclose any intent to call them as adverse witnesses. This motion was overruled.

On March 23, the State filed a motion in limine requesting that the court exclude as irrelevant any evidence or testimony regarding legislative action or inaction in the regulation of check cashing businesses in Mississippi and the involvement of the Attorney General's Office in any such legislation. They also

sought to exclude any evidence of policies of the Attorney General's Office regarding check cashing or the alleged conversation between the defendants and the Attorney General's Office. The State also requested that the court exclude any evidence of the investigation of the check cashing business in Mississippi by the Attorney General's Office, and any testimony regarding regulation of the check cashing business by the Department of Banking and Finance as irrelevant. Circuit Judge Robert H. Walker held a hearing on May 12 to hear arguments on the State's motion in limine, and the defendants' Suggested Conflict of Interest and Motion for Counsel to Withdraw. Judge Walker was going to make his ruling on these issues the following week.

The defendants filed their Motion to Quash and Dismiss Indictments and Demurrer on May 30. In this motion, the defendants alleged that Mississippi's RICO

Act was unconstitutionally vague and overbroad as applied to their case. Included with their motion was a brief and exhibits in support thereof. The State filed a rebuttal memorandum in response to the defendants' motion. Judge Walker held a hearing on defendants' motion on June 5. On June 16, Judge Walker issued his order granting the defendants' Motion to Quash and Dismiss Indictments and Demurrer, finding that the application of Mississippi's RICO Act to usury is unconstitutionally vague. Under the authority of Miss. Code Ann. § 99-35-103, the State filed its notice of appeal to this Court on July 6, 1995, based upon the issue of the constitutionality of Mississippi's RICO Act as applied to usury.

STATEMENT OF THE FACTS

Byron Roderick, a Jackson businessman, had previously opened cash checking businesses in the

Jackson area and decided to open a business in Gulfport. He hired Billy and Cynthia Saxton to manage the check cashing business in Gulfport, named "We Cash It." A customer could bring in either her own check or a third party check to be cashed at a discount rate. For example, Roderick Dixon presented a check for $265, and We Cash It gave Mr. Dixon $200, retaining $65 as a service charge. When a customer brought a check in to cash, she would sign an agreement that the check could be redeemed within fourteen days, or the check would be deposited. The agreement warned that there would be a $30 fee on any returned checks and that writing bad checks could lead to imprisonment.

Prior to opening his check cashing business, Byron Roderick consulted with an accountant and a couple of bankers to find out if the business was regulated and how he should set up the business so as to comply with

existing Mississippi law. He also secured a municipal license from the City of Gulfport. David DeGuire, a banker; Elvin J. Roberts, an accountant; and Ray Grubbs, a banker, all testified at the June 5 hearing on defendants' Motion to Quash and Dismiss Indictments and Demurrer. Each stated that they had informed Roderick that in their opinion, the check cashing industry was not currently regulated by the State of Mississippi and was legal. None of these witnesses believed that the business violated Mississippi's usury law, or any other law in the State. Mr. Grubbs, Mr. DeGuire, and Bill Jones, an attorney representing four check cashing businesses, all testified that check cashing amounted to discounting negotiable instruments, not usurious loans.

Mr. Roberts, who became a partner in one of Roderick's check cashing businesses in Clinton, testified that his son Chris Berry spoke with Alice Wise at the

Attorney General's Office regarding the legality of the check cashing industry. He stated that Ms. Wise informed Mr. Berry that no laws against check cashing existed in Mississippi, and that the practice did not violate Mississippi's usury laws. The defendants' attorney also indicated that the defendants and others in the check cashing industry had contacted the Attorney General's Office and other government offices regarding the regulation of check cashing. He stated that his clients and others similarly situated were informed before beginning business that the industry was not regulated, and they were led to believe that it was not a criminal activity. The Attorney General's Office does not admit that any such conversations took place.

Evidence was also presented showing that the Attorney General's Office engaged in discussions with representatives from the check cashing industry to reach

agreement on regulation of the businesses. At the suggestion of the Attorney General's Office, the check cashers association hired a lobbyist to encourage the Mississippi Legislature to pass regulations on the industry.

Despite their attempts to operate We Cash It within the laws of Mississippi, Roderick and the Saxtons were indicted for violating Mississippi's RICO Act. The indictment alleged that the defendants violated the law by engaging in an enterprise involved in collecting unlawful debts. The debts were allegedly rendered unlawful by the fact that they resulted from usurious loans. The circuit court dismissed the indictment based upon the determination that Mississippi's RICO Act is unconstitutionally vague as applied to usury.

STATEMENT OF THE LAW

Standard of Review

> Without doubt, our constitutional scheme contemplates the power of judicial review of legislative enactments; however, that power may be exercised affirmatively only where the legislation under review be found 'in palpable conflict with some plain provision of the . . . constitution.' Statutes . . . come before us clothed with a heavy presumption of constitutional validity. The party challenging the constitutionality of a statute is burdened with carrying his case beyond all reasonable doubt before this Court has authority to hold the statute, in whole or in part, of no force or effect. When a party invokes our power of judicial review, it behooves us to recall that the challenged act has been passed by legislators and approved by a governor sworn to uphold the selfsame constitution as are we.

In re T.L.C., 566 So.2d 691, 696 (Miss. 1990) (quoting *Hart v. State*, 39 So. 523, 524 (Miss. 1905) (internal citations omitted)).

I.

WHETHER THE TRIAL JUDGE ERRED IN THE QUASHING OF THE INDICTMENT ON THE GROUNDS THAT THE MISSISSIPPI RICO ACT, MISS. CODE ANN. § 97-31-1 (1972), ET SEQ. IS UNCONSTITUTIONALLY VOID FOR

VAGUENESS AND DOES NOT PROVIDE NOTICE TO THE DEFENDANTS OF THE CRIMES OF WHICH THEY ARE ACCUSED?

The State argues that Miss. Code Ann. § 97-43-5, under which the defendants were indicted, clearly prohibits the operation of a check cashing business such as We Cash It. The pertinent part of § 97-43-5 reads as follows:

> (3) It is unlawful for any person employed by, or associate with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.
> (4) It is unlawful for any person to conspire to violate any of the provisions of subsections (1), (2), or (3) of this section.

Miss. Code Ann. § 97-43-5(3) and (4).

> "Unlawful debt" means money or any other thing of value constituting principal or interest of a debt which is legally unenforceable in whole or in part because the debt was incurred or contracted in gambling activity in violation of state law or in the business of lending money at a

> rate usurious under state law, where the usurious rate is at least twice the enforceable rate.

Miss. Code Ann. § 97-43-3(b).

Mississippi has no criminal statute against usury, other than Miss. Code Ann. § 75-67-119, governing Small Loan Regulatory licensees, which was not charged in this case. Mississippi's civil usury statute, Miss. Code Ann. § 75-17-1, states, "The legal rate of interest on all notes, accounts and contracts shall be eight percent (8%) per annum, calculated according to the actuarial method. . ." Miss. Code Ann. § 75-17-1.

There are three transactions conducted by We Cash It outlined in the indictment which the State charges were violations of Mississippi law. In two of the transactions, We Cash It received checks for $198, paying the customer $150. The $48 charge amounts to 32% of the $150 received by the customer. The

indictment calls this 832% interest per anum, citing the fourteen day period allowed for reclaiming the check. This figure is calculated based upon the 32% fee over two weeks, multiplied by 26 (the number of two-week periods in one year), rendering a total of 832% annual interest. In the other transaction, the customer gave We Cash It a $265 check in return for $200, amounting to a one-time 32.5% charge, totaling 845% annual interest by the State's position. The State argues that the defendants unlawfully charged their customers well over twice the enforceable rate of interest in making loans to its customers, rendering the loans unenforceable debts pursuant to § 97-43-3(b). Because the defendants collected these unenforceable debts through the enterprise of We Cash It, the State concludes that the defendants operated their business in violation of § 97-43-5(3). The State also posits that the defendants conspired to collect

unenforceable debts, thereby violating § 97-43-5(4).

In ***Meeks v. Tallahatchie County***, 513 So.2d 563 (Miss. 1987), this Court applied the test for determining whether a statute is unconstitutionally vague as set out in ***Connally v. General Construction Co.***, 269 U.S. 385 (1926). "[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process." ***Meeks***, 513 So.2d at 566 (quoting ***Connally***, 269 U.S. at 391).

> Generally speaking, a criminal statute is unconstitutional under the due process clause of the Fourteenth Amendment if it is so vague and uncertain that it does not inform those subject to it what acts it is their duty to avoid, or what conduct on their part will render them liable to its penalties. . . . 'The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and

practices.'

Cassibry v. State, 404 So.2d 1360, 1367-68 (Miss. 1981) (quoting *Jordan v. DeGeorge*, 341 U.S. 223, 231 (1951)). *See also Reining v. State*, 606 So. 2d 1098, 1103 (Miss. 1992).

The check cashing industry, the defendants assert, is a legitimate business involved in discounting negotiable instruments. Their position is that they are not in the business of making loans, but cashing checks in exchange for a one-time fee. A check is a negotiable instrument "if it is a draft drawn on a bank and payable on demand." Miss. Code Ann. § 75-3-104. Post-dating does not affect the negotiability of a check. Miss. Code Ann. § 75-3-114. "A separate agreement does not affect the negotiability of an instrument." Miss. Code Ann. § 75-3-119(2). The checks cashed by We Cash It and other similar businesses were negotiable instruments.

However, when a negotiable instrument is purchased at a discount, the discount is still limited to the 8% interest limit set by Mississippi law. Miss. Code Ann. § 75-17-5. This Court has previously held

> While paper for which value has once been given can ordinarily be discounted at any rate, it is clear that the discount of paper for which no value has previously been given is the first value for such paper, and is usurious where it exceeds the rate allowed by usury statutes relating to loans. . .

Bell v. Tindall, 60 So.2d 801, 804 (Miss. 1952) (quoting 55 Am.Jur. § 27). The United States Supreme Court has also held that discounting notes in advance is not in itself usurious, but is limited to the maximum interest rate allowed by state law. ***Evans v. National Bank of Savannah***, 251 U.S. 108, 113-14 (1919). Even if We Cash It was involved in discounting negotiable instruments rather than making loans, the 8% allowable

interest rate would still apply and be well-exceeded in this case.

However, even if the defendants were engaging in usury, Roderick and the Saxtons argue that because usury is not a criminal offense in Mississippi, the application of Mississippi's RICO Act to usury is an attempt by the State to criminalize activity otherwise condoned by Mississippi law. Usury is not a crime in Mississippi, but only enforceable by civil remedy, except under § 75-67-119 as a misdemeanor, as previously discussed. The State's argument is that the Mississippi RICO Act does not make usury a crime, but instead creates a new crime of collection of an unlawful debt, using the usury statute only to define the legal rate of interest. This argument by the State amounts to legal gymnastics. Essentially, if the RICO Act is applied to usury, then usury conducted through an enterprise becomes criminal activity that

otherwise is merely subject to civil penalty under Mississippi law. As the circuit court stated in its opinion:

> If the Legislature intended to transform usury (which was theretofore recognized only as the basis for a civil right of action of defense, except as it pertains to Small Loan Regulatory licensees) into a crime when it enacted RICO, it had a duty to do so with sufficient specificity to give fair notice and definite warning of the conduct that is prohibited.

The State argued at the hearing that RICO is a general intent crime that takes its intent from the underlying crimes, attempting to prove that the intent required for a violation of RICO as applied to usury would not be specific intent. However, because the cases interpreting the level of intent for usury are civil, they do not apply to a criminal prosecution. ***Sunburst Bank v. Keith***, 648 So.2d 1147, 1151-52 (Miss. 1995). Because RICO does not set out the level of intent required for

prosecution of usury, an essential element of the crime is left out and would have to be guessed at by those trying to apply it or avoid prosecution under it.

Also, all crimes used as bases for a RICO prosecution are outlined in the RICO Act, and there are cross-references between RICO and the underlying criminal statutes. There do not appear to be any other cases in which Mississippi or any other state has tried to prosecute under RICO with a civil statute as the underlying offense. No reference to RICO is made in the usury statute or the other statutes on interest and finance charges, other than in the previously discussed § 75-67-119. A person of ordinary intelligence reading the laws governing interest rates, finance charges, and usury would not be given fair warning that usury is a prosecutable offense.

Adding to this confusion is the evidence that the

Attorney General's Office encouraged the check cashers association to lobby the Mississippi Legislature for regulation of their industry. It is disingenuous for the Attorney General's Office to call an activity criminal on the one hand, but to encourage its regulation on the other. The testimony regarding contact between the check cashers and the Attorney General's Office in which the check cashers were led to believe that their business was legal also adds support to the argument that the check cashing industry was not given fair notice that their activity was criminal. The fact that these defendants attempted to enter into their business legally by investigating the laws governing check cashing, and were unable to find any legal bar to their activity is strong evidence of the vagueness of Mississippi's RICO Act as applied to usury.

Roderick and the Saxtons also argue that the statute under which they were charged was intended by the

legislature to proscribe organized crime by mafia-type enterprises and loansharking enforced by violence. The language of Mississippi's RICO Act does not limit enforcement to the types of unlawful loans traditionally associated with loansharking and intimidation or brutality. However, because the check cashing industry is relatively new to Mississippi, having developed since 1990, it is unlikely that the Mississippi Legislature specifically intended to prohibit check cashers from operating through passage of the Mississippi RICO Act in 1986, modeled after the Federal RICO Act, 18 U.S.C.A. § 1962.

CONCLUSION

Mississippi's RICO Act fails to adequately outline the requisite intent for violation of the statute as applied to usury. While all other underlying offenses contain cross-references to RICO and are specifically outlined in RICO, Mississippi's usury law does not contain any cross-

reference to the RICO Act. The defendants in this case made a concerted effort to determine whether they were in compliance with Mississippi law, and yet were unable to find that their business violated Mississippi's RICO Act. Any other person of common intelligence reading RICO and the laws governing usury in Mississippi would be unable to ascertain that usury is criminally barred by RICO. As a result, we affirm the circuit court's order finding that Mississippi's RICO Act is unconstitutionally vague as applied to usury.

AFFIRMED.

LEE, C.J., PRATHER, P.J., PITTMAN[6], McRAE, SMITH, ROBERTS AND MILLS, JJ., CONCUR. BANKS, J., DISSENTS WITH SEPARATE WRITTEN OPINION.

BANKS, JUSTICE, DISSENTING:

With deference, I am compelled to dissent because, in my view, the statute in question amply apprises those

who would read it as to the conduct it prohibits and makes amenable to a criminal sanction. In my view, then, the statue is not void for vagueness. I would reverse the judgment of the circuit court dismissing the indictment and remand this matter to that court for further proceedings.

The statute in question prescribes that one involved with an enterprise that is engaged in the collection of an unlawful debt is subject to a criminal sanction. An unlawful debt is specifically defined to include one which carries an interest rate in excess of the rate allowed by law; an interest rate that exceeds twice the amount of the lawful rate is criminally unlawful. The rates allowed by law are those prescribed in our usury statutes. *See* Miss. Code Ann. § 75-17-1.

The circuit court asserted that it could not ascribe to the legislature an intent to criminalize usury. The fact is that the legislature has not criminalized *all* usury. It

criminalized usury where it rose to a specified degree, that is, twice the allowable rate. I know of nothing in our constitution that prohibits the legislature from treating that conduct or even lesser conduct as criminal. Surely, the statute does not become vague simply because the circuit court disagrees with the legislature as a matter of policy.

It is beyond dispute that check-cashing businesses can be operated[1] well within the constraints of the law. Here, however, the defendants were engaged in lending practices which involved fees, which are considered as interest under our usury statutes, in amounts as much as 832% (per annum) of the principal amounts advanced. These fees clearly violate the RICO statute, in that they

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[1] For example, as the majority notes, it is perfectly lawful for a business to cash payroll checks (or other third-party checks), *the value of which has already been defined,* for patrons, and retain for itself some discount from the amount on the face of the check. ***Bell v. Tindall,*** 60 So. 2d 801, 804 (Miss. 1952).

more than exceed twice the enforceable rate of interest. Defendants can point to no law that even arguably allows them to charge such a rate. They protest that the RICO law was aimed at those engaged in illegal "loansharking" or connected with organized crime. However, the clear language of the statute criminalizes the activity no matter who is engages in it, and no matter whether it arises to traditional notions of "loansharking." The fact that one operates as described in the statute out in the open, rather than in a gangster-filled back alley provides no immunity. *Cf. H.J. Inc. v. Northwestern Bell,* 492 U.S. 229, 249 (1989) ("Congress drafted RICO broadly enough to encompass a wide range of criminal activity, taking many different forms and likely to attract a broad array of perpetrators operating in many different ways"; "[l]egitimate businesses 'enjoy neither an inherent incapacity for criminal activity nor immunity from its

consequences'" (citations omitted)).

That said, the indictment here involved charges the defendants with "wilfully, knowingly, unlawfully and feloniously" performing the acts in question. We are not called upon to decide whether the addition of these words is necessary to the validity of a charge under the statute. It should suffice to say that these defendants' assertions concerning how they came to be in the business in the first place and their prior contacts with representatives of the government of the state of Mississippi will bear upon the ultimate determination whether they are guilty as charged, that is, whether they acted "wilfully, knowingly and feloniously." Those contentions do not seem to me to have any bearing on the question of whether the enabling statute is unconstitutionally vague.

The majority accepts the defendants' arguments concerning their efforts and those of the Attorney General

in seeking legislation regulating their practices. I do not. The plain fact is that the law prohibits the conduct here alleged. The failure to achieve legislative sanction for that conduct through recognition and further regulation in some manner does not, in my view, affect the validity of the prohibitory statute.

MANDATE
From The
SUPREME COURT OF MISSISSIPPI

To the Harrison County Circuit Court,
First Judicial District - GREETINGS:

On 7th Day of August, 1997, in proceedings held in the Courtroom, Carroll Gartin Justice Building, the City of Jackson, Mississippi, the Supreme Court of Mississippi entered a final judgment as follows:

Supreme Court Case #95-KA-00701-SCT
Trial Court Case #9400474

State of Mississippi
vs.
Byron Roderick, Billy Saxton and Cynthia Saxton

Affirmed. Banks, J., Dissents with Separate Written Opinion. Appellant is taxed with all costs of this appeal.

THURSDAY, NOVEMBER 6, 1997:
Disposition - Motion for Rehearing denied. Banks, J., would grant.

YOU ARE COMMANDED, that execution and further proceedings as may be appropriate forthwith be had consistent with this judgment and the Constitution and Laws of the State of Mississippi.

WITNESS, the Hon. Dan Lee, Chief Justice of the Supreme Court of Mississippi; also the signature of the Clerk and the Seal of said Court hereunto affixed in the City of Jackson, on November 13, 1997, A.D.

"s/ Charlotte B. Williams"
Supreme Court Clerk

IN THE SUPREME COURT OF MISSISSIPPI
DECISIONS HANDED DOWN ON THE 6th DAY
OF NOVEMBER 1997

(PAGE 4 OF 6)

EN BANC

95-KA-00701-SCT State of Mississippi v. ByronRoderick, Billy Saxton and Cynthia Saxton; Appeal No. 9400474 from Judgment dated JUNE 16, 1995, Harrison County Circuit Court, First Judicial District; DISPOSITION - Motion for Rehearing denied. Banks, J., would grant.

CIRCUIT COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

STATE OF MISSISSIPPI

VERSUS **NO. B-2401-94-00474**

BYRON RODERICK, BILLY SAXTON AND CYNTHIA SAXTON **DEFENDANTS**

ORDER

This cause is before the Court on various motions filed by the State and the Defendants.[1] After hearing

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[1]The State moved to preclude Defendants from introducing evidence of a telephone conversation with the Attorney General's office regarding the legality of running a check-cashing business, of legislative hearings regarding the regulation of, or need to regulate, said businesses, etc. The Defendants moved to suppress evidence seized under search warrant, to quash and dismiss the indictment and demurrer, and to require the Attorney General's office to recuse itself from

successive oral arguments on the motions, studying the written arguments and authority submitted by the parties, and researching the legal issues presented, the Court has determined that only one of the motions must be addressed. On May 30, 1995, Defendants filed a motion to quash and dismiss indictments and demurrer, challenging the constitutionality of the state's Racketeer Influenced and Corrupt Organization Act (RICO) [Miss. Code Ann. §97-43-1 *et seq.*] as it pertains to allegedly usurious loans.

During the times pertinent to the indictment in this case, Defendants undeniably operated a "check-cashing store" known as "We Cash It," which was licensed to do business by the City of Gulfport, Mississippi. The indictment charges that We Cash It was an enterprise as defined in the State RICO act, and that in operating the

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prosecution of the case.

business, Defendants:

> did wilfully, knowingly [sic], unlawfully, and feloniously participate, both directly and indirectly, in the said enterprise through a pattern and practice of collection of unlawful debt, in violation of Section 97-43-5(3), Mississippi Code, 1972, as amended, in that said defendants did transact loans with individuals and charge usurious rates of interest for said loans.

The indictment describes Defendants' business operation in this manner:

> Said business would give individuals U.S. currency in exchange for a check drafted on an open bank account. The check would be made payable for an amount greater than the U.S. currency given to the individual. It would be agreed that said check would not be deposited by the defendants for a specified period of time. The purpose of said agreement was to allow the individual to deposit funds in their account sufficient to "cover" said U.S. currency to We Cash It and their original check would be returned to them. The interest charged by We Cash It and the defendants was over twice the enforceable rate in the State of Mississippi.

The portions of the Mississippi RICO Act

pertinent to this case make it unlawful "for a person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt", and for any person to conspire to violate any of the provisions of §97-43-5. Miss. Code Ann. §97-43-5 (3) and (4). "Racketeering activity" as defined by the statute, involves the commission, attempted commission, conspiracy to commit, or solicitation, coercion or intimidation of another person to commit any crime chargeable under specifically enumerated statutes. All the listed statutes deal with activity clearly recognized and punishable as a crime under State law prior to the enactment of the RICO statute. Collection of an "unlawful debt" is not contained within the definition of racketeering activity in the Act; instead, it is defined as:

> money, or any other thing of value constituting principal or interest of a debt which is legally unenforceable in whole or in part because the debt was incurred or contracted in gambling activity in violation of state law or in the business of lending money at a rate usurious under state law, where the usurious rate is a least twice the enforceable rate.

Miss. Code Ann. §97-43-3(b). Of the two types of debts recognized as unlawful, the first arises out of the recognized criminal activity of illegal gambling. In short, with the exception of usurious loans, every activity proscribed by the RICO statute, arises out of conduct which was already statutorily recognized as criminal.

In argument before this Court, the State has consistently taken the position that RICO is a general intent crime; it is an umbrella type of crime which takes its intent from the underlying crimes; that the intent required a criminal RICO conviction is gleaned from the underlying offense and that usury is not specific intent

crime. The State's argument finds considerable support in cases construing the Federal RICO Act. However, there is nothing to indicate the intent required for a criminal RICO violation based upon acts which have never before been declared to be crimes, *e.g.*, usury in Mississippi. Rights of action or defenses on account of usury do not arise out of the common law, but are solely creatures of the statutes creating them. Deposit Guaranty Bank & Trust, Co. V. Williams. 193 Miss. 432, 9 So.2d 638 (1942). With the exception of Miss. Code Ann. § 75-67-11, no Mississippi statutes dealing with interest, finance charges and other charges [Miss. Code Ann. § 75-17-1 *et seg.*] do not state that usury is a crime of any degree, nor do they contain any criminal penalty for charging usurious interest - the penalty is forfeiture of the

usurious interest.[2] The Mississippi Supreme Court stated in Wallace v. Fouche, 27 Miss. (5 Cushman) 266, 269 (1854), that the taking or reserving of illegal interest has not been declared a punishable offense under the law. With the exception of licensees under the Small Loan Regulatory Law, that fact had not changed at the time RICO was enacted - no other Mississippi statute sets out the elements of a crime usury.[3] Case law construing the intent required to give rise to a civil action or defense based on usury is unpersuasive as to what constitutes criminal usury in Mississippi. Our sister state of Florida,

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[2]Section 75-67-119 deals with excess finance charges by licensees under the Small Loan Regulatory Law, and provides that such a licensee charging more than 100% of the charge authorized by law would be guilty of a misdemeanor. This is the only statute dealing with interest and finance charges which is cross-referenced to the State RICO act. The indictment does not allege that defendants in this case were licensees under the Small Loan Regulatory Law.

[3]See footnote 2, above.

which has both criminal and civil usury statutes, has held:

> Unlike most crimes which require only a general intent to do the act prohibited by criminal law, and also unlike the fewer crimes that require a specific intent on the part of the defendant at the time of the doing of the prohibited act, the crime of usury peculiarly requires the existence of a "corrupt intent" to charge, take or receive more than the legal rate for the use of money loaned and the allegation of that particular mens rea is embodied in the statutory words "willfully and knowingly" which are therefore essential elements of the definition of the statutory offense of usury that must be alleged in the charging document in order to adequately define and charge the crime and to meet the constitutional mandate that the accused be informed of the nature and cause of the accusation against him. (footnotes omitted)

Polakoff v. State, 586 So. 2d 385 (Fla. App. 1991). Whether Mississippi would hold likewise is, at present, a matter of pure speculation. In addition, the Court notes that although the RICO statute, and the vast majority of

statutes cited therein which may serve as a basis for a RICO charge, are cross-referenced to each other in the Mississippi Code. There is no cross-reference between RICO and the Mississippi statutes dealing with interest and finance charges, other than as to licensees under the Small Loan Regulatory Law. In other words, Defendants could thoroughly study Mississippi's statutes on interest and finance charges, and remain totally unaware that charging usurious interest might be a crime under Mississippi law.

At a minimum, criminal statutes must give fair notice and definite warning of conduct which is prohibited. In State ex rel. Dist. Atty. v. Winslow, 208 Miss. 753, 45 So. 2d 574 (1950), the Mississippi Supreme Court recognized that this is essential to the validity of a criminal law. Quoting 14 Am Jur. § 19, the Court stated:

The legislature, in the exercise of its power to declare what shall constitute a crime or punishable offense, must inform the citizen with reasonable precision what acts it intends to prohibit, so that he may have a certain understandable rule of conduct and know what acts it is his duty to avoid. If the meaning of a criminal statute cannot be judicially ascertained or if, in defining a criminal offense, it omits certain necessary and essential provisions which go to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiency, or undertake to make the statute definite and certain. If a statute uses words of no determinative meaning and the language is so general and indefinite as to embrace not only acts properly and legally punishable, but others not punishable, it will be declared void for uncertainty. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Purely statutory offenses cannot be established by implication. There can be no constructive offenses. Before a man can be punished, his case must be plainly and unmistakably within a statute. A statute that either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess as to its meaning and differ as to its application lacks the first essential of due process of

law.

Winslow, 45 So. 2d at 576. It is not sufficient for a statute to merely deal with punishment without defining the underlying crime. See, *e.g.*, Boydstun v. State, 249 So.2d 411 (Miss. 1971). If the Legislature intended to transform usury (which was theretofore recognized only as the basis for a civil right of action or defense, except as it pertains to Small Loan Regulatory licensees) into a crime when it enacted RICO, it had a duty to do so with sufficient specificity to give fair notice and definite warning of the conduct that is prohibited. This Court is of the opinion that the RICO statute does not meet this standard to create a crime of usury sufficient to sustain a conviction under the allegations of the indictment in this case. It is therefore,

ORDERED AND ADJUDGED, that the indictment in this case is dismissed as the purported

creation of a crime of usury by the Mississippi RICO Act is unconstitutionally vague, and cannot serve as the basis for a criminal conviction under the facts alleged in the indictment. So ordered this the 16th day of June, 1995.

"s/ Robert H. Walker"
ROBERT H. WALKER
CIRCUIT JUDGE

Filed
June 16, 1995
Gayle Parker
Circuit Clerk
Harrison County

MISS.CODE ANN. § 97-43-5. Prohibited activities.

(1) It is unlawful for any person who has with criminal intent received any proceeds derived, directly or indirectly, from a pattern of racketeering activity or through the collection of an unlawful debt to use or invest, whether directly or indirectly, any part of such proceeds or the proceeds derived from the investment or use thereof, in the acquisition of any title to, or any right, interest, or equity in, real property or in the establishment or operation of any enterprise.

(2) It is unlawful for any person, through a pattern of racketeering activity or through the collection of an unlawful debt, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise or real property.

(3) It is unlawful for any person employed by, or associated with, any enterprise to conduct or participate, directly or indirectly, in such enterprise through a pattern of racketeering activity or the collection of an unlawful debt.

(4) It is unlawful for any person to conspire to violate any of the provisions of subsections (1), (2) or (3) of this section.

MISS.CODE ANN. § 97-43-3. Definitions.

The following terms shall have the meanings ascribed to them herein unless the context requires otherwise:

(a) "Racketeering activity" means to commit, to attempt to commit, to conspire to commit, or to solicit, coerce or intimidate another person to commit any crime which is chargeable under the following provisions of the Mississippi Code of 1972:

(1) Section 97-19-71, which relates to fraud in connection with any state or federally funded assistance programs.

(2) Section 75-71-735, which relates to violations of the Mississippi Securities Act.

(3) Sections 45-13-105, 45-13-109, 97-37-23 and 97-37-25, which relate to unlawful possession, use and transportation of
explosives.

(4) Sections 97-3-19 and 97-3-21, which relate to murder.

(5) Section 97-3-7(2), which relates to aggravated assaults.

(6) Section 97-3-53, which relates to kidnapping.

(7) Sections 97-3-73 through 97-3-83, which relate to robbery.

(8) Sections 97-17-19 through 97-17-37, which relate to burglary.

(9) Sections 97-17-1 through 97-17-13, which relate to arson.

(10) Sections 97-29-49, 97-29-51 and 97-29-53,

which relate to prostitution.

(11) Sections 97-5-5 and 97-5-31 through 97-5-37, which relate to the exploitation of children and enticing children for concealment, prostitution or marriage.

(12) Section 41-29-139, which relates to violations of the Uniform Controlled Substances Law; provided, however, that in order to be classified as "racketeering activity," such offense must be punishable by imprisonment for more than one (1) year.

(13) Sections 97-21-1 through 97-21-63, which relate to forgery and counterfeiting.

(14) Sections 97-9-1 through 97-9-77, which relate to offenses affecting administration of justice.

(15) Sections 97-33-1 through 97-33-49, which relate to gambling and lotteries.

(b) "Unlawful debt" means money or any other thing of value constituting principal or interest of a debt which is legally unenforceable in whole or in part because the debt was incurred or contracted in gambling activity in violation of state law or in the business of lending money at a rate usurious under state law, where the usurious rate is at least twice the enforceable rate.

(c) "Enterprise" means any individual, sole proprietorship, partnership, corporation, union or other legal entity, or any association or group of individuals associated in fact although not a legal entity. It includes illicit as well as licit enterprises and governmental, as well as other, entities.

(d) "Pattern of racketeering activity" means engaging in at least two (2) incidents of racketeering conduct that have the same or similar intents, results, accomplices, victims, or methods of commission or

otherwise are interrelated by distinguishing characteristics and are not isolated incidents, provided at least one (1) of such incidents occurred after the effective date of this chapter and that the last of such incidents occurred within five (5) years after a prior incident of racketeering conduct.

18 U.S.C. §1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. §1961, Definitions

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

MULTI-COUNT INDICTMENT

THE STATE OF MISSISSIPPI, CIRCUIT COURT
FIRST JUDICIAL DISTRICT, HARRISON COUNTY
MARCH TERM, A.D., 1994
NO. B-2401-94-00474

THE GRAND JURORS of the State of Mississippi, taken from the body of the good and lawful citizens of the First Judicial District of Harrison County, duly elected, empaneled, sworn and charged to inquire in and for the said State, County and District, at the Term of Court aforesaid, in the name and by the Authority of the State of Mississippi, Upon their oaths present:

at all time material hereto the defendants, BYRON M. RODERICK, BILLY D. SAXTON AND CYNTHIA SAXTON were associated together in an enterprise as defined by Section 97-43-3(c), Mississippi Code, 1972, as amended, in that they operated and conducted the affairs of a business known as "We Cash It" located at 1317-D 24th Avenue, Gulfport, Mississippi.

COUNT I

The Defendants BYRON M. RODERICK, BILLY D. SAXTON AND CYNTHIA SAXTON, while associated with and operating the aforesaid "We Cash It" and acting in concert with each other and aided, abetted and assisted, each by the other, before, and after the fact in the First Judicial District of Harrison County, Mississippi and within the jurisdiction of this Court, did wilfully, knowlingly [sic], unlawfully and feloniously participate, both directly and indirectly, in the said enterprise through a pattern and practice of collection of

unlawful debt, in violation of Section 97-43-5(3), Mississippi Code, 1972, as amended, in that said defendants did:

beginning on or about the 22nd day of February, 1993, and continuing until on or about the 22nd day of October, 1993, both dates being approximate and inclusive, transact loans with individuals and charge usurious rates of interest for said loans. Said business or enterprise would advertise its services as a "check cashing" business. The said description of the services of We Cash It was actually a sham and an artifice to avoid Mississippi laws against usury. Said business would give individuals U.S. currency in exchange for a check drafted on an open bank account. The check would be made payable for an amount greater than the U.S. currency given to the individual. It would be agreed that said check would not be deposited by the defendant's for a specified period of time. The purpose of said agreement was to allow the individual to deposit funds in their account sufficient to "cover" said check. The individual would also have the option of delivering the negotiated amount in U.S. currency to We Cash It and their original check would be returned to them. The interest charged by We Cash It and the defendants was over twice the enforceable rate in the State of Mississippi. Specifically, the defendants did:

A. on or about February 22, 1993, the aforesaid We Cash It being then and there operated by the defendants who were then and there aided and abetted and assisted by each other loaned One Hundred and Fifty Dollars ($150.00) to Joyce Nelson and for security of payment of the sum received, Joyce Nelson was required

to deliver to We Cash It a check in the amount of One Hundred and Ninety Eight Dollars ($198.00), with the understanding the check was to be negotiated on March 8, 1993, or Joyce Nelson was to bring in the negotiated amount to We Cash it in U.S. currency and the original check would be returned to Joyce Nelson. The difference between the cash received by Joyce Nelson and the amount to be repaid was Forty Eight Dollars ($48.00), said amount to be paid along with the principal amount of One Hundred and Fifty Dollars ($150.00), within 14 days. Said Forty Eight Dollars ($48.00) represents the amount charged by We Cash It which equals approximately 832% interest per annum.

B. on or about March 2, 1993, the aforesaid We Cash It being then and there operated by the defendants who were then and there aided and abetted and assisted by each other loaned One Hundred and Fifty Dollars ($150.00) to Louise Maye and for security of payment of the sum received, Louise Maye was required to deliver to We Cash It a check in the amount of One Hundred and Ninety Eight Dollars ($198.00), with the understanding the check was to be negotiated on March 16, 1993, or Louise Maye was to bring in the negotiated amount to We Cash it in U.S. currency and the original check would be returned to Louise Maye. The difference between the cash received by Louise Maye and the amount to be repaid was Forty Eight Dollars ($48.00), said amount to be paid along with the principal amount of One Hundred and Fifty Dollars ($150.00), within 14 days. Said Forty Eight Dollars ($48.00) represents the amount charged by We Cash It which equals approximately 832% interest per annum.

C. on or about July 1, 1993, the aforesaid We Cash It being then and there operated by the defendants who were then and there aided and abetted and assisted by each other loaned Two Hundred Dollars ($200.00) to Roderick Dixon and for security of payment of the sum received, Roderick Dixon was required to deliver to We Cash It a check in the amount of Two Hundred and Sixty Five Dollars ($265.00), with the understanding the check was to be negotiated on July 15, 1993, or Roderick Dixon was to bring in the negotiated amount to We Cash it in U.S. currency and the original check would be returned to Roderick Dixon. The difference between the cash received by Louise Maye and the amount to be repaid was Sixty Five Dollars ($65.00), said amount to be paid along with the principal amount of Two Hundred ($200.00), within 14 days. Said Sixty Five Dollars ($65.00) represents the amount charged by We Cash It which equals approximately 845% interest per annum.

D. on or about July 21, 1993, the aforesaid We Cash It being then and there operated by the defendants who were then and there aided and abetted and assisted by each other loaned One Hundred and Fifty Dollars ($150.00) to Deonka Bridgewater and for security of payment of the sum received, Deonka Bridgewater was required to deliver to We Cash It a check in the amount of One Hundred and Ninety Eight Dollars ($198.00), with the understanding the check was to be negotiated on August 4, 1993, or Deonka Bridgewater was to bring in the negotiated amount to We Cash it in U.S. currency and the original check would be returned to Deonka Bridgewater. The difference between the cash received by Deonka Bridgewater and the amount to be repaid was

Forty Eight Dollars ($48.00), said amount to be paid along with the principal amount of One Hundred and Fifty Dollars ($150.00), within 14 days. Said Forty Eight Dollars ($48.00) represents the amount charged by We Cash It which equals approximately 832% interest per annum.

The aforesaid Debts were and are unlawful in that they were legally unenforceable because said debts were contracted during and in the course of business of lending money at a rate usurious under the laws of the State of Mississippi, said rate being over twice the enforceable rate in the State of Mississippi, said unlawful debt being specifically defined in Section 97-43-3(b), Mississippi Code, 1972, as amended, and contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

COUNT II

The defendants BYRON M. RODERICK, BILLY D. SAXTON and CYNTHIA SAXTON, on or about and between the 22nd day of February, 1993 and the 22nd day of October, 1993, in the First Judicial District of Harrison County, Mississippi, and within the jurisdiction of this Court did wilfully, knowlingly [sic], unlawfully and feloniously, in violation of Section 97-43-5(4), Mississippi Code, 1972, as amended, conspire and agree, together and with each other, and with other persons to the grand jury unknown, to participate in the operation and affairs of the aforesaid We Cash It as set forth in Count 1 hereof, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the State of Mississippi.

A TRUE BILL

"s/ Joe Goff"
SPECIAL ASSISTANT ATTORNEY GENERAL

"s/ Peter J. Quave"
FOREMAN OF THE GRAND JURY

WITNESSES:
Sgt. Ed Twomey, Gulfport Police Department, Gulfport, MS

AFFIDAVIT

COMES NOW Peter J. Quave, Foreman of the aforesaid Grand Jury, and makes oath that this indictment presented to this Court was concurred in by twelve (12) or more members of the Grand Jury and that at least fifteen (15) members of the Grand Jury were present during all deliberations.

"s/ Peter J. Quave"
FOREMAN OF THE GRAND JURY

Sworn to and subscribed before me this the 19th day of August, 1994.

GAYLE PARKER, CIRCUIT CLERK

BY: "s/ Shirley Valdez, D.C."
(SEAL) FILED

THE UNITED STATES CONSTITUTION
AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
FILED
MAY 14 1998
CLERK

No. 97-1565

In The

Supreme Court of the United States

October Term, 1997

THE STATE OF MISSISSIPPI,

Petitioner,

v.

BYRON RODERICK, BILLY SAXTON and CYNTHIA SAXTON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Mississippi

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Is there any jurisdiction for this Court to hear this case, a case involving the Mississippi Supreme Court's interpretation of Mississippi law and its holding of a Mississippi statute unconstitutionally void for vagueness?

If there is jurisdiction, did the Mississippi Supreme Court err in determining that the Racketeer Influenced Corrupt Organizations Act (RICO), Miss. Code Ann. §§ 97-43-3(b) and 97-43-5(3, 4) (1972) are unconstitutionally vague as applied to Mississippi's civil usury statute thus invoking the jurisdiction of this Court?

LIST OF INTERESTED PARTIES

1. State of Mississippi, Petitioner

2. Hon. Jean Smith Vaughan, Consumer Protection Division, Office of the Attorney General of the State of Mississippi, and Counsel for Petitioner

3. Hon. Leslie Staehle, Consumer Protection Division, Office of the Attorney General of the State of Mississippi

3. Byron Roderick, Respondent

4. Billy Saxton and Cynthia Saxton, Respondents

5. Hon. Earl L. Denham, Counsel for Respondents

6. Hon. Robert H. Walker, Circuit Court Judge

Other Interested Parties:

7. Hon. Mike Moore, Attorney General of the State of Mississippi

8. City of Gulfport, Mayor Ken Combs

9. Hon. James B. Halliday, Gulfport Assistant City Attorney

10. Harrison County, Mississippi and the Harrison County Board of Supervisors, Bobby Eleuterius, President, Larry Benefield, David LaRosa, Sr., Robin Alfreda Midcalf, and C. T. Switzer, Jr.

11. Hon. Steve Simpson, Harrison County Assistant District Attorney

12. Hon. Edward O'Neal, Harrison County Assistant District Attorney

LIST OF INTERESTED PARTIES – Continued

13. Ed Twomey, Detective, Gulfport Police Department
14. George H. Payne, Jr., Chief of Police, Gulfport Police Department
15. Hon. William H. Jones, Attorney representing several "check cashing" businesses in Mississippi
16. Elvin J. Roberts, Check Cashing, Incorporated
17. Mississippi Check Cashing Association, Elvin J. Roberts, President, Todd Broom, Vice-President, Jackie Peterson, Secretary, Dan Robinson, Treasurer, Danny King, former president
18. Hon. Mike Frascogna, Attorney for Mississippi Check Cashing Association

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JURISDICTION

Petitioner relies upon 28 U.S.C. § 1275 to invoke the jurisdiction of this Court. Respondent assumes that Petitioner has committed a scrivener's error in attempting to cite 28 U.S.C. § 1257. (App. - 1.)

According to 28 U.S.C. § 1257, jurisdiction of this Court is granted after final judgment or decree is rendered by the highest court of a state in the following instances: (a) where the validity of a treaty or statute of the United States is drawn in question; (b) where the validity of a statute of any State is drawn into question as being repugnant to the Constitution, treaties or laws of the United States; or (c) where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, statutes, or any commission or authority of the United States.

In the instant case, there is no dispute regarding the validity of a treaty or statute of the United States. As to the validity of a state statute, the Mississippi Supreme Court examined the use of Mississippi's civil usury law as the predicate "crime" for an indictment under the Mississippi RICO statute and held that the application of the Mississippi RICO statute to the Mississippi civil usury law would criminalize activity not previously criminal under Mississippi statutes without fair notice and definite warning of the prohibited conduct. Such a finding is clearly not repugnant to the Constitution, treaties or laws of the United States. Finally the record is clear that this matter does not involve any title, right, privilege, or immunity protected by the Constitution, treaties, statutes,

or any commission or authority of the United States. This Court does not have jurisdiction in this matter.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioner sets forth 18 U.S.C. § 1962 in its declaration of the constitutional and statutory provisions which are to be reviewed by this Court. This citation, however, is also erroneous as the Respondents were not indicted under the federal RICO Act, nor did the Mississippi Supreme Court or the trial court find it necessary to rely upon the federal RICO Act for guidance to determine the constitutionality of Petitioner's utilizing Mississippi's civil usury law as the basis for a criminal indictment of Respondents under Mississippi's RICO Act. As the record clearly demonstrates, the Petitioner's sole reference to federal RICO during argument before the lower court was to inform the lower court that Mississippi RICO is similar to federal RICO. No federal statute played any role in the history of this case. The decision turned on state law as interpreted by the Mississippi Supreme Court, which held that under the peculiar circumstances of this case and given the interpretation of Mississippi statutes concerning usury, the state RICO statutes, Miss. Code Ann. §§ 97-43-3(b) and 97-43-5(3, 4) (1972), are constitutionally void for vagueness when used by the State to attempt to criminalize usury, a civil offense in Mississippi. (Pet. App. - 43.)

STATEMENT OF THE CASE

Respondent, BYRON RODERICK, a businessman from Jackson, Mississippi, opened a check cashing service in Gulfport, Mississippi. He leased a location, raised the necessary start-up cash, and hired Respondents, BILLY SAXTON and CYNTHIA SAXTON, to open and manage the business which was known as "We Cash It". The business purchased a license from the City of Gulfport in September of 1993 and advertised itself. The purpose of the business was to provide discounted cash for a customer's check with the customer allowed fourteen to sixteen days to redeem the check. If the customer chose not to redeem the check, then "We Cash It" would deposit the customer's check. Although customers were not required to pay interest, a one-time fee was charged for the service. Customers sometimes post-dated checks which they tendered to the business.

The check cashing industry was at the time of the alleged crime unregulated by the State of Mississippi but flourishing statewide. The Mississippi Attorney General's office (including Leslie Staehle and Jean Smith Vaughan in their capacities as Special Assistant Attorneys General), the Legislature, and the Check Cashing Association were meeting regularly to discuss and negotiate legislative regulation of the fledgling industry prior to and during the time Respondents were in business. (R - 20-21, 110-112, 114-115.) Testimony from various witnesses was presented to the lower court regarding conversations and meetings with the Check Cashing Association, the district attorney, various members of the Attorney General's office, the legislative Banking Committee, and Attorney General Mike Moore. (R - 71, 83-85, 108-111, 114, 118-126.)

During cross-examination, Special Assistant Attorney General Jean Smith Vaughan acknowledged that the meetings occurred. Because of the State's interest in regulating check cashing, Roderick and others in the business repeatedly tried to obtain and did obtain guidance from the Attorney General's office regarding the legality of the business prior to opening.

However, after "We Cash It" opened for business an investigation by the City of Gulfport Police Department ensued utilizing information and testimony provided by, of all people, Special Assistant Attorney General Leslie Staehle. On October 22, 1993, eight police officers raided the premises of "We Cash It" with a search warrant based on Staehle's "interpretation" of Mississippi's RICO statute. The police officers meticulously went through everything on the premises, including a fast food lunch bag containing a hamburger. Except for a few large pieces of furniture, the police seized nearly everything on the premises, including all checks, business documents, video tape machines, calculators, telephones, filing cabinets, and even the hamburger, causing a total shutdown of the business. Roderick and the Saxtons could not continue to operate the business without their business records. The destruction of the business was one obvious intent of the search.

Despite numerous telephone calls by Respondents' counsel during which the police maintained that there was no ongoing investigation in progress, the confiscated property was not returned until November 9, 1993, when furnishings and equipment of the office, minus the negotiable instruments, were returned to the Respondents. Without the checks the business completely failed.

On August 19, 1994, Respondents, Byron Roderick, Billy Saxton, and Cynthia Saxton were indicted by the Grand Jury of Harrison County, Mississippi, on two counts of alleged violations of Mississippi RICO (not three counts as is alleged by the Petitioner). (Pet. - 3; Pet. App. - A-48 - A-52.) The statute upon which the underlying predicate "crime" of usury was based was not cited in the indictment.

On March 23, 1995, the Petitioner filed a Motion In Limine requesting the court to "exclude any evidence or testimony by the Defendants (Respondents) of any official or unofficial action or lack of action by the Office of the Attorney General, its agents or employees, relating to the business of check cashing in the State of Mississippi . . . " (CP - 17-22. Quoting from p. 17.) Defendants / Respondents filed a Suggestion of Conflict of Interest and Motion for Counsel to Withdraw on or about March 28, 1995.

During a hearing held on May 12, 1995, arguments of counsel were heard by the Circuit Court, and the pre-arrest conduct of Leslie Staehle and Jean Smith Vaughan, who were now representing the State in its prosecution of this case, was presented to the Circuit Court. The court was informed that these two attorneys, while acting in their official capacities as Special Assistant Attorneys General and other state officials, had represented to Roderick and other agents and representatives of check cashing businesses that check cashing as a business in Mississippi is legal. Further, these same two attorneys were intimately involved in negotiations, conferences and legislative committee meetings regarding proposed legislation to regulate check cashing businesses in Mississippi.

(R - 21-23, 28, 30, 71-73, 83-84, 96, 108-112, 119-121.) According to the record, Special Assistant Attorney General Staehle gave a verbal opinion to the Gulfport Police Department which precipitated the arrests of the Respondents for the same alleged "criminal activity" to which on the other hand she was referring before the legislature as a business activity which should be regulated.

Respondents filed a Motion to Quash and Dismiss Indictment and Demurrer and supporting brief on May 30, 1995. On June 5, 1995, the date set for the trial, a hearing was held on the motion, and three days later the Circuit Court entered its Order dismissing the indictment. (Pet. App. A-31 - A-42.) The Petitioner then appealed the matter to the Mississippi Supreme Court. After briefs were submitted by all parties, the Mississippi Supreme Court affirmed the Circuit Court's order. *State v. Roderick*, 704 So.2d 49, 54-55 (Miss. 1997). Being aggrieved with the decision of the Mississippi Supreme Court, the Petitioner filed its Petition for Writ of Certiorari to which Respondents now reply.

CORRECTION OF MISSTATEMENTS IN THE PETITION

The Petitioner complains that the Mississippi Supreme Court erred in accepting testimony presented in the Circuit Court regarding the Respondents' efforts to obtain information from the Attorney General's office regarding the law and check cashing business prior to beginning a new venture in this fledgling industry. The testimony clearly established a lack of criminal intent and

was properly offered for that purpose as well as to demonstrate prosecutorial misconduct. The Petitioner, although admitting that meetings occurred and contact was made with various individuals in the check cashing industry, refused to acknowledge its own participation in the Respondents' efforts to follow state law. During the hearing before the Circuit Court undisputed testimony was offered that check cashing is unregulated in Mississippi and that the Attorney General's office met on numerous occasions with representatives of the check cashing industry to formulate proposed regulations for submission to the Legislature. In any case no federal issue exists in regard to the Petitioner's concerns.

The Petitioner has made unsubstantiated and unproven allegations that the Respondents advanced funds for fees up to 900% interest. Testimony before the Circuit Court established that those in the check cashing industry were discounting negotiable instruments and charging a one time fee to cash each check. Again, no federal issue is presented.

Petitioner's argument that the purpose of RICO is to eradicate organized crime implies that the Respondents are involved with organized crime. During briefing before the Mississippi Supreme Court, the Petitioner's numerous references to "loansharking" were made in the State's desperate attempt to raise a stigma of mafia connections and underworld dealing which are nothing short of pathetic. These implications were never raised before the Circuit Court and are not supported by the record, the facts, or the indictment. The record clearly demonstrated the following: (a) Byron Roderick was a respected businessman in Jackson, Mississippi, who has owned and

operated a vacuum cleaner sales and service business for over twenty-two years (R - 17, 109); (b) Billy Saxton is a retired City of Gulfport police officer (R - 16-17); (c) Cynthia Saxton is a therapist in a hospital. (R - 16-17); and (d) "We Cash It" was the first venture by any of these parties in a check cashing business. There is no evidence to support the Petitioner's allegation that these parties have any history of involvement with organized crime. The Respondents would point out, *arguendo*, that if the Respondents are involved with organized crime, then the Attorney General was knowingly meeting with the mafia to regulate and profit by its nefarious activities. Again, there is no federal issue.

The record does not support the Petitioner's claim that Respondents have "claimed to be outside the law" or stated "that no law applied to them." (Pet. - 20.) Since Mississippi has no regulatory guidelines for check cashing businesses, Roderick, along with numerous others in the business, contacted and met with the Attorney General's office to seek guidance and to discuss proposed legislative regulation. Based upon information obtained from the Attorney General's office, and in particular from the very same Special Assistant Attorneys General who are currently prosecuting this matter, the Respondents opened for business. This was only one of many similar check cashing businesses which operated in Mississippi at the time. After the State seized nearly every asset in the business, "We Cash It" ceased operation and went out of business. If Respondents had truly believed that "no law applied to them," they would not have made such a diligent effort to obtain guidance from the State prior to beginning operations. Respondents were advised that

there was no law governing check cashing in Mississippi, but it is clearly improper to attempt to put a cynical spin onto what is a mere statement of fact. Lack of regulation by the State of Mississippi does not confer the specter of illegality upon the industry. Thus, lack of criminal intent is apparent from the record, but this is hardly an issue which this Court should review.

REASONS FOR DENYING THE WRIT

The Petition for Writ of Certiorari should be denied as no federal question was raised in the courts below and none can be raised here. The validity of the indictment in the instant case is solely dependent upon an interpretation of Mississippi's RICO Act as it applies to Mississippi's civil usury statute as interpreted by Mississippi's Supreme Court. There is no interpretation or application of federal law in the record.

The Mississippi Supreme Court in affirming the lower court's dismissal of the indictment against the Respondents, held that the Mississippi RICO statute as it was applied in this matter to an allegation of usury is unconstitutional in Mississippi as it failed to meet the notice requirements of the Fourteenth Amendment. The Mississippi Supreme Court's finding of unconstitutionality pertains only to that portion of the Mississippi RICO Act which applies to usury as defined under state law.

1. Review is not required as no federal question was presented in the courts below:

The Mississippi Supreme Court's decision was a plainly correct analysis of the law of the State of Mississippi. Here there is no conflict between state and federal law or between the decision of the Mississippi Supreme Court and that of any federal court. Petitioners' primary concern distills down to the fact that the Mississippi Supreme Court did not rely upon federal RICO cases when making its analysis of Mississippi RICO and Mississippi's usury statute. In fact, no such reliance is possible in a case based solely on state court interpretation of state usury statutes. Although the wording of Mississippi RICO statutes may be based upon that of the federal RICO statutes, the indictment specifically cites Mississippi RICO. Neither the trial court nor the Mississippi Supreme Court were required to rely upon federal RICO in their interpretation of state law. (Pet. App. - A-48 - A-52.)

The indictment does not cite the Mississippi usury statute which is relied upon by the State as the underlying predicate crime. This would trouble any court, but here there was an obvious reason. It did not cite the only statute applicable to Respondents because it is civil – not criminal in nature. After Respondents were indicted, the Petitioner verbally informed them that the indictment was based upon Mississippi's civil usury statute. The Mississippi Supreme Court wryly noted the "legal gymnastics." *State v. Roderick, supra,* at 54 (Miss. 1997).

Petitioner alleges that the Mississippi Supreme Court misapplied the test for constitutionality set forth in *Connally v. General Construction Co.*, 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926), but a review of the Mississippi Supreme Court's decision clearly indicates otherwise. *State v. Roderick, supra*, at 52-55. The Mississippi Supreme Court's decision was a plainly correct application of the *Connally* test to the facts and law in the instant case.

2. The Mississippi Supreme Court was not required to rely upon case law from other jurisdictions in its analysis of this matter:

The lower court was asked to determine whether Mississippi RICO was correctly applied to the facts in this particular case, not whether federal RICO or another state's RICO statutes are constitutional or even applicable. The lower court was also asked to determine whether the Respondents were given sufficient constitutional notice that their business activities could be construed as criminal acts forbidden by usury statutes of the State of Mississippi, not by usury statutes of Florida, Ohio, New Jersey, New York, or those of any other state. Although, *arguendo*, RICO state statutes may generally differ little from state to state they do differ, and the usury statutes of each state significantly differ. Some states have criminal usury statutes, but in Mississippi the only criminal statute governs Small Loan Regulatory licensees and even the Petitioner has never charged its applicability to the Respondents. The Petitioner has repeatedly stated that the statute upon which the RICO indictment is based is the civil usury statute.

The case law from other jurisdictions that was cited by Petitioner discussed RICO indictments which were based upon criminal statutes, not a civil statute as exists in Mississippi. The Mississippi Supreme Court specifically addressed this point in its decision:

> Also, all crimes used as bases for a RICO prosecution are outlined in the RICO Act, and there are cross-references between RICO and the underlying criminal statutes. *There do not appear to be any other cases in which Mississippi or any other state has tried to prosecute under RICO with a civil statute as the underlying offense.* [Emphasis added.] No reference to RICO is made in the usury statute or the other statutes on interest and finance charges, other than in the previously discussed § 75-67-119. A person of ordinary intelligence reading the laws governing interest rates, finance charges, and usury would not be given fair warning that usury is a prosecutable offense. *State v. Roderick, supra,* at 54.

3. The failure of the Mississippi RICO statutes and the indictment to afford due process notice that an activity is criminal.

Pursuant to case law cited by the Petitioner, "an indictment charging a statutory crime is sufficient if it *substantially follows the language of the criminal statute . . .* " [Emphasis added.] *United States v. Eufrasio,* 935 F.2d 553, 575 (C.A. 3 1991), *cert. denied,* 502 U.S. 925, 112 S.Ct. 340, 116 L.Ed.2d 280 (1991). *See also United States v. Addonizio,* 451 F.2d 49, 58 n. 7 (3d Cir. 1971), *cert. denied,* 405 U.S. 936, 92 S.Ct. 949, 30 L.Ed.2d 812 (1972). In *Eufrasio,* the court stated that the indictment must track the language of the criminal statute in order to allow the defendant adequate knowledge to develop a defense against the charge. *Id.* at

575-576. In the instant case, the indictment against the Respondents did not *cite* any criminal statute other than RICO; it merely refers in the abstract to the civil usury statute.

According to the Petitioner, "[d]ue process will not invalidate a statute if assistance [is] necessary to give the words of the statute a reasonable meaning," one may merely refer to the dictionary for enlightenment. (Pet. - 16.) However, in a criminal matter due process requires notice of the elements of the alleged crime, not just a definition of the word "usury." A penal statute must be sufficiently explicit so as to inform those subject to its mandates that conduct will be penalized. *Huntley v. State*, 524 So.2d 572 (Miss. 1988). *See also Nichols v. City of Gulfport*, 589 So.2d 1280 (Miss. 1991) [Penalties of the law cannot rest upon subjective guidelines, nor can the law subject individuals to penal consequences without first providing sufficiently definite notice of warning of what is prohibited.]

Without a clear understanding of the elements of the underlying predicate crime upon which the RICO indictment is based, the Respondents had no way of knowing with what they have been charged. Since the statute upon which the Petitioner relied for the indictment is a civil usury statute, the Respondents had no way of knowing that their acts could be considered criminal in nature.

Words of a statute or act should be ascribed their ordinary and usual meaning absent legislative guidance to the contrary. *Ahmad v. State*, 603 So.2d 843, 845 (1992), *citing Pearl River Valley Water Supply Dist. v. Hinds County*, 445 So.2d 1330, 1334 (Miss. 1984). The "ordinary and

usual meaning" of a violation of the usury statute relied upon by the Petitioner has been interpreted by the Mississippi Supreme Court as a civil offense not a criminal offense. *See State v. Roderick, supra,* 53-55. Therefore, there was no notice that a violation of the usury statute, if in fact such occurred, was subject to criminal prosecution.

The Petitioner argues that due process does not require a finding that a statute is void for vagueness because the average person must seek legal counsel to interpret the statute. *Citing* 62 Harv. L.R. 77, 78 (1948). Respondents are entitled to notice of the crime with which they have been charged. The requirement of notice is not an attempt to place the Respondents outside the law but to enable them to prepare a defense against the charges contained in the indictment. Testimony and evidence presented during a hearing before the lower court clearly demonstrated that the Respondents and all other individuals interested in establishing check cashing businesses in Mississippi were making every effort to comply with the law. The police had no idea a "crime" was occurring until the Special Assistant Attorney General explained matters. Even the Mississippi Supreme Court has been unable to explain to the Special Assistant Attorney General that no crime ever occurred. Given the confusion of the experts, the vagueness of the statute should be apparent.

4. The Petitioner's claim that intent is proved by the indictment:

Petitioner argues that the Mississippi "RICO statute adds an element of 'criminal intent' which must be read

in pari materi [sic] and applied to each of the prohibited acts in the statute." (Pet. - 21, para. 2.) The Petitioner relied upon *U.S. v. Aucoin*, 964 F.2d 1492 (5th Cir. 1992), *cert. denied*, 121 L.Ed.2d 587, 113 S.Ct. 661 (1992), to claim that the element of intent is supplied by the indictment itself and argues: "The RICO statute must be construed so as to effectuate the legislative intent to eradicate organized crime. When the language of the statute conveys sufficient definite warning of the proscribed conduct when measured by common understanding and practices, the Constitution requires no more." (Pet. - 22-23, 25.) In *Aucoin*, the jury was instructed that proof of specific intent was required before a defendant could be convicted of the crimes charged, but the court did not hold that one may look to the indictment to establish intent. *Supra*, at 1498. Here, the prohibited act is not contained within those statutes specifically set forth in RICO as prohibited acts but instead is an alleged violation of a civil usury statute, a statute subject exclusively to interpretation by the Mississippi Supreme Court.

"In determining the sufficiency of the notice, a statute must be examined in light of the conduct with which a defendant is charged. The test for vagueness is not whether there are marginal or remote cases in which its clarity may be in doubt, but whether it conveys an adequate warning in a specific situation. *State v. Passante*, 225 N.J. Super. 439, 542 A.2d 952, 956 (1987), *citing Williams v. United States*, 341 U.S. 97, 71 S.Ct. 576, 95 L.Ed. 774 (1951); *U.S. v. Petrillo*, 332 U.S. 1, 67 S.Ct. 1538, 91 L.Ed. 1877 (1947). The *Passante* court stated: " . . . 2C Rico does not make conduct criminal that was not already prohibited

before its enactment. It was intended to serve as a remedial statute, providing enhanced criminal and civil sanctions for conduct *prohibited by existing state and federal law.*" [Emphasis added.] *Passante, supra,* at 957. Here the Petitioner is attempting by invoking RICO to make conduct criminal that is not rendered criminal by state law. Respondents clearly did not have "sufficient definite warning of the proscribed conduct." *See U.S. v. Petrillo, supra.*

According to the Petitioner, the prosecution would never have to prove any defendant's intent because the "intent" would always be established by the use of the term "willful" in the indictment. How can the Respondents prepare a defense if (1) the Petitioner does not have to specify the crime charged, and (2) the Petitioner is allowed to prove intent by the use of terminology such as "willful" in the indictment. Such manipulation of the true meaning of "due process" was surely never envisioned by the makers of the Constitution of the United States and the Constitution of the State of Mississippi. There can be no question that the applicable *mens rea* of the predicate "crime," in this case "usury," is an essential which must be proved by the State.

In *United States v. Biasucci,* 786 F.2d 504, 512 (C.A. 2 1986), *cert. denied,* 479 U.S. 827, 107 S.Ct. 104 (1986) the court stated that since "RICO imposes no *additional* mens rea requirement beyond that found in the predicate crimes" we must "look to the scienter elements found in the statutory definitions of the predicate crimes to determine the degree of knowledge that must be proved to establish a RICO violation." *Id.* at 512. *See also United States v. Pepe,* 747 F.2d 632, 675-76 (C.A. 11 1984); *State v.*

Thrower, 62 Ohio App.3d 359, 575 N.E.2d 863, 872 (1989). The court should define the mental state required by the predicate act, i.e., "knowingly" and "willfully." *United States v. Pepe, supra,* at 676. In the instant case, the "predicate crime" is alleged by the Petitioner to be a violation of the civil usury statute of the State of Mississippi, an act in Mississippi which is no "crime" at all.

Respondents could only prepare a defense based upon the charges contained within the indictment. *See also Polakoff v. State of Florida*, 586 So.2d 385 (Fl. 1991). [A count charging a defendant with a state law violation of RICO which defines "an unlawful debt" only by reference to that term in the statute, which itself refers generally to many other statutes relating to many types of illegal usurious debts is invalid, as the information does not directly refer to the usury chapter generally or to a specific usury statute.]

Where a crime consists of an act combined with specific intent, intent is just as much an element of the crime as the act, thus mere general malice or criminal intent is insufficient as an element and specific intent must be shown as a matter of fact, either by direct or circumstantial evidence. *Hydrick v. State*, 150 So.2d 423, 246 Miss. 448 (Miss. 1963).

In Mississippi, in order to establish a *civil* violation of the usury statute Miss. Code Ann. § 75-17-1 (1972), the creditor must intend to commit usurious acts. (App. - 1-2.) *Sunburst Bank v. Keith*, 648 So.2d 1147 (Miss. 1995). However, even if intent is established and it is found that the creditor exceeded the lawful interest rate, forfeiture of

"all interest" is the penalty. *Id.* at 1152. *See also* Miss. Code Ann. § 75-17-5 (1972). (App. - 2.)

CONCLUSION

Evidence and testimony presented to the lower court demonstrates that the Respondents were involved in a legitimate, though unregulated, business which is a relatively new and growing industry in the State of Mississippi. Testimony established that various individuals contacted the office of the Attorney General regarding the business of "check cashing" in the State of Mississippi and were told that it is legal. (R - 21-23, 71-73, 83-84, 103, 108-112, 119-121, 125-126, 129.) After contacting the office of the Attorney General and various banking and finance officials throughout Mississippi for instructions and advice, the Respondents began operating a "check cashing" business in Gulfport known as "We Cash It." Respondents were then targeted for arrest and caused to be indicted by the same state officials to whom they had turned for advice. Respondents never had any intention of violating the laws of the State of Mississippi, never violated any state or federal law, and have never claimed "to be outside the law" or implied that "no law applied" to them. Respondents made diligent efforts to identify what laws applied to the "check cashing" industry and to abide by those laws.

The Mississippi Supreme Court held that Mississippi's usury statute is clearly civil not criminal, thus no matter how many lawyers review the statute and interpret its wording, the statute has no criminal penalty. The

Petitioner has even admitted that this is so. The decision of the Circuit Court and the Mississippi Supreme Court that the Mississippi RICO statute is void for vagueness as it applies to the facts in the instant case is clearly correct. There are no questions of federal law in this matter, thus this Court does not have jurisdiction to review the judgment on a writ of certiorari. *See Adams v. Robertson*, 117 S.Ct. 1028, 520 U.S. 83, 137 L.Ed.2d 203 (1997). Based upon the foregoing, Respondents respectfully request the Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

28 U.S.C.A. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

MISS. CODE ANN. (1972) § 75-17-1. Legal rates of interest and finance charges.

(1) The legal rate of interest on all notes, accounts and contracts shall be eight percent (8%) per annum, calculated according to the actuarial method, but contracts may be made, in writing, for payment of a finance charge as otherwise provided by this section or as otherwise authorized by law.

(2) Any borrower or debtor may contract for and agree to pay a finance charge for any loan or other

extension of credit made directly or indirectly to a borrower or debtor which will result in a yield not to exceed the greater of ten percent (10%) per annum or five percent (5%) per annum above the discount rate, excluding any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the lender is located, each calculated according to the actuarial method. The rate of finance charge authorized under this subsection (2) shall be known as the "contract rate."

(3) Notwithstanding the foregoing and any other provision of law to the contrary, any partnership, joint venture, religious society, unincorporated association, or domestic or foreign corporation, whether organized for profit or nonprofit, may contract for and agree to pay a finance charge which will result in a yield not to exceed the greater of fifteen percent (15%) per annum or five percent (5%) per annum above the discount rate, excluding any surcharge thereon, on ninety-day commercial paper in effect at the Federal Reserve bank in the Federal Reserve district where the lender is located, each calculated according to the actuarial method, on any contract, loan, extension of credit or other obligation under which the principal balance to be repaid shall originally exceed Two Thousand Five Hundred Dollars ($2,500.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced shall exceed Two Thousand Five Hundred Dollars ($2,500.00); and as to any such agreement, the claim or defense of usury by such partnership, joint venture, religious society, unincorporated association, or

corporation, or their successors, guarantors, assigns or anyone on their behalf is prohibited.

(4) Notwithstanding the foregoing and any other provision of law to the contrary, any borrower or debtor may contract for and agree to pay a finance charge which will result in a yield not to exceed the greater of ten percent (10%) per annum or five percent (5%) per annum above the index of market yields of the Monthly Twenty-Year Constant Maturity Index of Long-Term United States Government Bond Yields, as compiled by the United States Treasury Department, each calculated according to the actuarial method, on any loan, mortgage or advance which is secured by a lien on residential real property or by a lien on stock in a residential cooperative housing corporation where the loan, mortgage or advance is used to finance the acquisition of such stock. The term "residential real property," as used in this subsection, means real estate upon which there is located or to be located a structure or structures designed in whole or in part for residential use, or which comprises or includes one or more apartments, condominium units or other dwelling units.

(5) Notwithstanding the foregoing and any other provision of law to the contrary, any borrower or debtor may contract for and agree to pay and any lender or extender of credit may contract for and receive any finance charge agreed to in writing by the parties, notwithstanding that such charge is in excess of that otherwise allowed on any contract, credit sale, obligation or other extension of credit, regardless of the security taken or the purpose of the extension of credit, under which the principal balance to be repaid originally exceeds Two

Thousand Dollars ($2,000.00), or on any series of advances of money pursuant to a contract if the aggregate of sums advanced or originally proposed to be advanced exceeds Two Thousand Dollars ($2,000.00), or on any extension or renewal thereof; and as to any such agreement, the claim or defense of usury or violation of any law prescribing, limiting or regulating the rate of finance charge by any borrower or debtor, or his successors, guarantors, assigns or anyone on his behalf is prohibited.

This subsection (5) shall stand repealed on July 1, 2001.

MISS. CODE ANN. (1972) § 75-17-5. Discount, interest, bank issues.

The issues, bills, notes, bonds, or certificates of deposit of any bank, corporation, or association of persons formed for banking purposes, or possessing banking privileges, situated within or without the limits of this state, shall not be loaned in this state by any agent, officer or person employed by, or having any interest in or connection with, any such bank, corporation, or association of persons, at a greater rate of discount or interest than is allowed by the laws of this state. All contracts and agreements made in violation of the provisions of this section shall, as to the whole of the discount or interest allowed or paid, or agreed to be allowed or paid, be void, and the discount or interest may be recovered back by the person suffering such discount or paying such interest.

No. 97-1565

Supreme Court, U. S.
FILED
JUN 8 1998

IN THE

Supreme Court of The United States

OCTOBER TERM, 1997

THE STATE OF MISSISSIPPI,

Petitioner,

VERSUS

BYRON RODERICK, BILLY SAXTON and CYNTHIA SAXTON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

REPLY TO BRIEF IN OPPOSITION

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QUESTION PRESENTED

WHETHER THE MISSISSIPPI RACKETEER INFLUENCED CORRUPT ORGANIZATIONS ACT (RICO), MISS. CODE ANN. § 97-43-1 *et seq.*, THE COLLECTION OF AN UNLAWFUL DEBT, IS VOID FOR VAGUENESS?

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JURISDICTION LIES IN THE UNITED STATES SUPREME COURT.

Petitioner invokes the jurisdiction of this Court under the authority of 28 U.S.C. § 1257[1], this Court's authority to review a final judgment of the highest court of the state in which a state statute has been held repugnant to the Constitution. The sole issue *sub judice* is the validity of the Mississippi RICO statute as void for vagueness under the Fourteenth Amendment of the Constitution of the United States, §1; any other issue raised in Respondents' brief is simply not before this Court.

The Constitutional issue of void for vagueness was first raised by the Respondents in the Harrison County Circuit Court in a motion to quash the indictment, (App.-

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[1]Respondent correctly points out the inadvertent reversal of the section number in the Petitioner's Brief citing 28 U.S.C. § 1275 instead of 28 U.S.C. § 1257.

Circuit Court in a motion to quash the indictment, (App.-48)[2], which charged the Respondents with the substantive RICO offense of collection of an unlawful debt through the enterprise of loaning money and the conspiracy to violate the Mississippi RICO Act. Quashing the indictment, the circuit court held that Miss. Code Ann. 97-43-1 *et seq.*, the Mississippi RICO Act, by purportedly creating a crime of usury was "unconstitutionally vague."[3] (App.-31). Petitioner appealed the question of law to the Mississippi Supreme Court, which affirmed the circuit court's order, finding that Mississippi's RICO Act was "unconstitutionally

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[2]Appendix, Petitioner's Petition for Writ of Certiorari to the Mississippi Supreme Court.

[3] Respondent's motion to quash the indictment erroneously sought to test the legal sufficiency of the State's evidence, a matter reserved for trial and not to be litigated in pretrial or this forum. *Grady v. State*, 281 So. 2d 678,680 (Miss. 1973).

vague as applied to usury."[4] (App.-22). Motion for rehearing was denied, and the Petitioner now appeals to this Court for relief.

Respondents' contention that the Mississippi Supreme Court failed to analyze the question under federal jurisprudence is erroneous. Citing this Court's void for vagueness doctrine, the Mississippi Supreme Court analyzed the state RICO Act in terms of notice and application requirements.[5] The Constitutionality of the statue was addressed under the federal Constitution, and the Court specifically acknowledged the state statute's precursor, the Federal RICO Act, 18 U.S.C.A. § 1962.[6]

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[4]*State v. Roderick*, 704 So.2d 49 (Miss. 1997).

[5]*Id.*, 704 So. 2d at 53, relying on *Connally v. General Construction Co.*, 269 U.S. 385 (1926), the court specifically analyzed the state RICO statute under the Fourteenth Amendment.

[6] The court acknowledged that the state RICO Act was modeled on the federal RICO Act. *Id.*, 704 So. 2d

The federal issue of void for vagueness under the Fourteenth Amendment was pressed and passed on in the final decision of the highest state court. *See, Illinois v. Gates*, 462 U.S. 213,218 (1983) and Judge Posner's opinion in *Lynk v. Laporte Superior Court No. 2,* 789 F. 2d 554,564 (7th Cir. 1986). Therefore, this Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondents cite the obvious, *i.e.*, they were not indicted under the federal RICO Act, 18 U.S.C.A. §1962; the indictment clearly referenced the Mississippi RICO Act, which clearly set forth the prohibited acts of collection of an unlawful debt and conspiracy to collect

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49,54 (Miss. 1997).

an unlawful debt. (App. -48). The State of Mississippi reasserts its position that the facts of the case are not peculiar, and under the notice and application requirements of the Fourteenth Amendment, Respondents fall squarely under the cloak of the state RICO Act, which like its federal counterpart prohibits loansharking. In this case of first impression challenging the state RICO Act, the interpretation of the state law did not follow the findings of this Court in *H.J., Inc. V. Northwestern*, 492 U.S. 229 (1989) and *Fort Wayne Brooks, Inc. v. Indiana*, 489 U.S. 46 (1989). Mississippi's limiting of the broad and remedial purposes set forth by Congress and adopted by the Mississippi Legislature, *e.g.,* to establish new penal provisions and enhanced punishments to deal with loansharking[7], will lead to a narrowing of Fourteenth

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[7]*Organized Crime Control Act of 1970,* Statement of Findings and Purpose, 84 Stat. 922-23.

Amendment interpretation as applied to both state and federal RICO.[8]

ARGUMENT

While not admitting to any of the Respondents' allegations, Petitioner refers the Court to the facts stated in its brief and the indictment and does not accept or stipulate to Respondent's version of the facts of this case,

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[8]The Mississippi Supreme Court's opinion is in conflict with this Court's holding of Constitutionality of federal RICO in *N.J., Inc. v. Northwestern Bell*, 492 U.S. 229 (1989). Constitutional challenges to state statutes include but are not limited to the following decisions: *Freeman v. State,* 554 So.2d 621 (Fla. Dist. Ct. App. 1989) (state RICO statute not unconstitutionally vague); *Corp. v. Goldsmith,* 504 N.E. 2d 559 (Ind. 1987) (state RICO Act constitutional; *State v. Passante,* 542 A.2d 952 (N.J. 1987) (state RICO act constitutional); *State v. Romig,* 73 Or. App. 780, 700 P.2d 293 (1985) (state RICO Act constitutional); *State v. Thompson,* 751 P.2d 805 (Utah Ct. App. 1988)(same). *But cf. State v. Feld,* 155 Ariz. 88, 745 P.2d 147 (Ct. App. 1987) (certain remedies given to state under state RICO Constitutional, certain are not).

an effort to distract from the single issue before this Court, the Constitutionality of the Mississippi RICO Act's prohibited acts of the collection of an unlawful debt through loansharking.[9] Respondents rely on Miss. Code Ann. 1972 § 75-17-5 for the premise that they were discounting notes and were not in the business of loaning money, therefore they were not subject to the RICO statute, pleading a mistake of law defense.[10] Respondents' arguments are specious at best, failing to cite any law which sanctions their business practice,

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[9] See, *U.S. v. Coonan*, 938 F. 2d 1553 (2nd Cir. 1991)(federal RICO constitutional, loansharking). *Cf.*, *U.S. v. Blinder*, 10 F. 3d 1468 (9th Cir. 1993)(enterprise of brokerage houses and blind pool companies, federal RICO not unconstitutionally vague).

[10] *Polakoff v. State,* 596 So. 2d 385 (Fla. App. 5 Dist. 1991) is distinguishable in that indictment failed for specific referral to either of Florida's usury statutes. Mississippi has only one usury statute. Miss. Code Ann. 1972 § 75-17-1 *et seq.*

which are clearly delineated in the indictment .[11] Respondents' intent to violate the law is a matter of proof at trial. In light of the excessive interest charged, the Mississippi Supreme Court specifically found that if Respondents were in the business of discounting notes, the 8% interest rate set by the state usury statute was applicable to the transactions of the Respondents. *Roderick*, 704 So. 2d at 53.

Justice Banks focused on the issue of vagueness, stating Legislative authority to criminalize conduct and

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[11]The label placed on the charge is not determinative whether the transaction is a loan. If the charge is ... "compensation for the use, forbearance, or detention of money, it is by definition interest regardless of the label placed upon it or the artfulness with which it is concealed." *Najarro v. SASI International*, 904 F. 2d 1002, 1006 (5th Cir. 1990). Relying on *Dixon v. Brooks*, 678 S.W. 2d 728,729 (Tex. App-- Houston [14th Dist.] 1984), the Fifth Circuit in *Najarro*, at 1010, also found that a contract would be usurious if there were any "mode or contingency by which the lender could receive more than the maximum rate of interest allowed by law."

Respondents' lack of law which sanctioned the charging of interest in amounts as much as 832% per annum. *Id.* Additionally, the justice did not give credence to Respondents' contentions that their efforts to get approval for their business practices by allegedly contacting the Attorney General's office or the efforts of the Attorney General to seek regulatory authority over the check cashing industry, somehow excused the acts of Respondents or were relevant to the determination of the vagueness of the statue.[12] Likewise, the analysis of the Constitutionality of the state RICO statute must be

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[12]Respondents cite *U.S. Biasucci*, 786 F. 2d 504,512 (1986), for the proposition that they were charged with the "predicate act" of usury, which is a civil defense, evincing their misunderstanding of RICO. The necessity of proving predicate crimes is peculiar to proof of a "pattern of racketeering activity" and not to the "collection of an unlawful debt', which may be proved by the collection of a single debt. *U.S. v. Pepe*, 747 F. 2d 632 (11th Cir. 1984). Petitioner argues that RICO refers to the usury law to detemine the legal rate of interest.

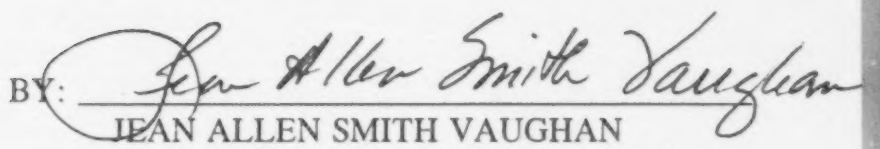
bottomed on principles of statutory interpretation and not unversacious, lack of legal argument in an effort to excuse Respondents' criminal activity.

CONCLUSION

For the above and foregoing reasons the State of Mississippi would submit that this Court review the decision of the Mississippi Supreme Court reversing the holding that the Mississippi RICO Act was void for vagueness under Fourteenth Amendment Due Process.

Respectfully submitted,

MIKE MOORE
ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: 
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